93-338

No. _____

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In The

Supreme Court of the United States

October Term, 1993

LAKE FOREST DEVELOPMENTS,

Petitioner,

v.

FIRST GIBRALTAR BANK, FSB,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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88 pp

QUESTION PRESENTED

Does the common law estoppel rule established in *D'Oench, Duhme & Co., Inc. v. FDIC* apply to a case in which the claims or defenses are based on the breach of a written loan agreement?

LIST OF PARTIES

Petitioner: Lake Forest Developments

Respondent: First Gibraltar Bank, FSB[1]

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[1] The Federal Savings and Loan Insurance Corporation was involved from the date of removal until August 9, 1989, the effective date of FIRREA. Thereafter, the Federal Deposit Insurance Corporation as Manager of Federal Savings and Loan Insurance Corporation Resolution Fund, as Receiver for Gibraltar Savings Association became involved as a party to the suit until Order for Summary Judgment was entered on March 26, 1991, reproduced as Appendix D, p. App. 17, infra. No appeal was taken from this Order.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner, Lake Forest Developments, a joint venture ("Lake Forest"), respectfully prays that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in the above-entitled proceeding on April 28, 1993.

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit has not yet been reported, but is reproduced as Appendix A, p. App. 1, infra.

JURISDICTION

The opinion of the Court of Appeals was delivered on April 28, 1993. See Appendix A, p. App. 1, infra. The judgment of the Court of Appeals was also entered on April 28, 1993. See Appendix B, p. App. 13, infra. The Order of the Court of Appeals denying Lake Forest's request for rehearing was entered on June 1, 1993. See Appendix F, p. App. 20, infra. The jurisdiction of the Court to review the judgment of the Fifth Circuit Court of Appeals is invoked under 28 U.S.C. §1254(1).

STATEMENT OF CASE

A. Basis of District Court Jurisdiction

In August 1981, Lake Forest filed suit in the 17th Judicial District Court of Tarrant County, Texas, against Gibraltar Savings Association ("GSA") for wrongful foreclosure of a deed of trust covering real property in Denton County, Texas, and for damages. This suit was based

on the breach of a written loan agreement dated March 30, 1977 between GSA as Lender and Lake Forest as assignee of the loan agreement.

On December 27, 1988, the Federal Home Loan Bank Board appointed the FSLIC as receiver of GSA. Subsequently, the FSLIC entered into a Purchase and Assumption Agreement with First Gibraltar Bank, FSB ("First Gibraltar").

On or about January 25, 1989, the FSLIC as receiver intervened in the state court action and filed a verified petition for removal pursuant to 12 U.S.C. §1730(k)(1) and 28 U.S.C. §1441, which removed the action to the United States District Court for the Northern District of Texas, Fort Worth Division.

B. Statement of Background Facts

Prior to 1977, GSA was advancing development funds to and had a profit participation in an entity known as Trophy Club Joint Venture ("Trophy Club") which was a joint venture composed of Johnson-Loggins, Inc. ("Johnson-Loggins"), Ben Hogan ("Hogan"), and John McMackin ("McMackin").

In March of 1977, at the insistence of GSA, Trophy Club was dissolved with Johnson-Loggins' withdrawal. GSA assumed management of the property with the exception of 75 acres. This tract of 75 acres was the basis of a new loan agreement between GSA and Johnson-

Loggins dated March 30, 1977. See Appendix G, p. App. 22, infra. On the same day, i.e., March 30, 1977, Johnson-Loggins deeded the 75 acres to Hogan and McMackin and assigned the loan agreement to them with the express agreement of GSA. See Appendix H, p. App. 33, infra.

This assignment included all of the rights and obligations, including those described in the promissory note in the principal amount of $1,800,000.00, which was executed pursuant to Section 2.02 of the loan agreement. See Appendix I, p. App. 35, infra.

On September 14, 1977, Hogan conveyed his interest in the 75 acres to McMackin. See Appendix J, p. App. 39, infra, and on the same day, McMackin conveyed the 75 acres to Lake Forest. See Appendix K, p. App. 41, infra. This transaction was approved in writing by GSA on November 7, 1977. See Appendix L, p. App. 44, infra.

The development proceeded on schedule through the balance of 1977 and into late 1978. In the Fall of 1978, the furnishing of new funds in the form of a renewal, extension, and an additional loan as contemplated by the loan agreement for the development of new phases of the property was discussed by representatives of Lake Forest with Charles Ackerman ("Ackerman"), Vice President of GSA and Wiley Wisely ("Wisely"), who was President of GSA. Lake Forest was informed in the early Fall of 1978, that it would have to provide appraisals to support an increased overall loan amount. This was the first time the subject had come up because there had been no appraisal in connection with the March 30, 1977 loan in the amount of $1,800,000.00. It was during these discussions that the meaning of the provision in Section 2.02 of the loan

agreement which refers to reappraisals came up. Both Wisely and Ackerman told Lake Forest's representatives that the provision applied to reappraisals for phases which had already been appraised and approved for funding, but did not apply to *new* appraisals for the funding of development of *new* phases.

The negotiations for renewal, extension and additional funds were completed in January of 1979, and reduced to writing in a memorandum from Ackerman to Leroy Land dated January 11, 1979. See Appendix M, p. App. 45, infra. It should be noted that the memorandum refers to "reappraisal" in paragraph one, but as "appraisal" in all other references. In any event, the two appraisals referred to therein, one of which was dated November 13, 1978 and the other November 20, 1978, respectively, were original appraisals because no appraisal had been furnished in connection with the March 1977 $1,800,000.00 loan. As a result of the January 11, 1979 memorandum, the loan request for $2,412,240.00 was approved and a new *non-recourse* note in the amount of $2,960,000.00 was executed on May 29, 1979. See Appendix N, p. App. 49, infra. The difference between the $2,412,240.00 referred to in the January 11, 1979 memorandum and the May 29, 1979 note represented additional monies to be advanced which had accumulated between January and the end of May 1979.

The development of the property again continued in an orderly manner through 1979 and into the Fall of 1980. In the Fall of 1980, two new loans were negotiated. The first loan was a collateral loan covering outstanding purchase money notes in the amount of $546,000.00 and the second loan was a follow on development loan to pay-off

the 1979 loan and to provide funds for the development of additional phases or sections. The loan requests were supported by two *new* appraisals dated October 7, 1980 and October 22, 1980. All of these negotiations were reduced to writing in a memorandum from Ackerman to Leroy Land dated November 14, 1980. See Appendix O, p. App. 54, infra.

In the summary and recommendations portion of the memorandum, Mr. Ackerman notes:

> "Based on the performance of the developer to date, and the high sensitive nature of this property as it affects the future development of Trophy Club, I recommend this loan be made."

Obviously, at this point in time, there was no problem with Lake Forest's performance.

No action was taken on these loan requests from the middle of November 1979 until only February 1980. However, during that period of time, Wisely had been fired as President of GSA.

At a meeting on February 5, 1980, Ackerman informed McMackin that GSA would refuse to fund under the terms of the existing March 30, 1977 loan agreement and, in addition, would make no further development advances unless:

1. The existing loan agreement was terminated by written termination instrument;

2. GSA would have no future obligation to furnish further development funding in contravention of Section 2.02; and

3. McMackin would execute a 100% personal guaranty of the loan in contravention of Section 5.01 of the loan agreement, the provisions of the promissory note, and the provisions of the Deed of Trust.

All of these discussions were included in a written memorandum from Ackerman to E. Michael Lallinger, Chairman of the Board of GSA dated February 9, 1981. See Appendix P, p. App. 58, infra. The next day, i.e., on February 10, 1981, the Senior Loan Committee approved the loan request subject to the changes contained in the February 9th memo. See Appendix Q, p. App. 60, infra. It should be noted that item 3 of the written Committee action states "Releases: 100% of net sales receipts or 110% of *appraisal*, whichever is greater." [Emphasis added] and that item 5. states: "Loan amount on collateral notes not to exceed loan balance or 80% of *appraisal*." [Emphasis added]. At the time of this action by the Committee, which was reduced to writing, the appraisals of October 7, 1980, and October 22, 1980, had been accepted. This fact is of critical importance because it establishes that the loan negotiations did not fail because of the exercise of any right of GSA to refuse to accept new appraisals or reappraisals.

It is undisputed that all of the documents referred to in this section of the Petition for Writ and contained in the appendices were kept in the loan file of Lake Forest in the official records of GSA and remained there during the receivership of the FSLIC and were subsequently delivered to First Gibraltar.

C. Proceedings in the Courts Below

1. **State Court Proceedings.** As previously stated the action was originally brought by Lake Forest against GSA in the 17th District Court of Tarrant County, Texas. It was removed to the United States District Court by the FSLIC pursuant to 12 U.S.C. §1730(k)(1) and 28 U.S.C. §1441.

2. **District Court Proceedings.** After discovery had been conducted by all parties, Defendants First Gibraltar and the FDIC moved for summary judgment. Plaintiff, Lake Forest opposed Defendants' motions and also moved for summary judgment. By Orders entered March 26, 1991, the District Court granted First Gibraltar's and FDIC's Motions for summary judgment. See Appendix C, p. App. 15, infra and Appendix D, p. App. 17, infra. Judgment was entered by the District Court on March 26, 1991. See Appendix E, p. App. 19, infra.

3. **Fifth Circuit Proceedings.** In its appeal, Lake Forest contended that neither the common law estoppel doctrine established by this Court in *D'Oench, Duhme & Co. v. Federal Deposit Insurance Corp.*, 315 U.S. 447 (1942) nor the provisions of 12 U.S.C. §1823(e) barred the claims of Lake Forest which were based on the breach of provisions of a written loan agreement which agreement was contained in the official Lake Forest loan file of GSA and subsequently those of First Gibraltar. Lake Forest further argued that the loan agreement imposed bilateral obligations which prevented the application of *D'Oench, Duhme*, and that the

> FSLIC as replaced by the FDIC and First Gibraltar took the property subject to the lis pendens filing in Denton County, Texas.

Since no appeal had been taken from the summary judgment in favor of the FDIC, First Gibraltar was the only appellee. On appeal, First Gibraltar contended that the *D'Oench, Duhme* doctrine and 12 U.S.C. §1823(e) precluded Lake Forest's claim of wrongful foreclosure based on the breach of the written loan agreement because: (1) the notes and deeds of trust were self-contained documents which did not refer to the loan agreement and therefore the provisions of the loan agreement imposing bilateral obligations could not be considered by the Court, (2) since Lake Forest was not a signatory party to the loan agreement, it could not claim any rights under it, and (3) Lake Forest's claims were barred by the federal common law holder in due course doctrine.

The case was set for oral argument and was argued in March of 1992 before a panel consisting of Circuit Judgment Garwood, Emilio M. Garza, and John R. Brown. Subsequent to oral argument, but before the opinion came down, Judge Brown passed away. The opinion was handed down on April 28, 1993, approximately 13 months after the oral argument.

Between the dates of the filing of Lake Forest's and First Gibraltar's briefs in August and September, 1991, and the Court's decision on April 28, 1993, certain rules of law applicable to this case had become well settled. Under the holding of the Court in *Sunbelt Savings, FSB, Dallas, Texas v. Montross*, 923 F.2d 353, *rehearing granted and panel opinion reinstated in part*, 944 F.2d 227 (5th Cir.

1991) it is clear that a successor holder of a non-negotiable note such as the one in this case where there was no personal liability as well as other non-negotiable elements could not avail itself of holder in due course protection.

Further, First Gibraltar's contention that the Court should look only to the notes and deeds of trust and not to other loan documents contained in the loan file was clearly repudiated by the Fifth Circuit in the case of *Resolution Trust v. Oaks Apartments Joint Venture*, 966 F.2d 995 (5th Cir. 1992).

However, rather than applying the holdings in these decisions to the case at bar, the Court based its decision on grounds which had never been put forth by First Gibraltar, either in motion for summary judgment or in any brief filed with the Court on appeal. The point which was raised for the first time by counsel for First Gibraltar in oral argument and upon which the Court subsequently relied for the basis of its opinion were certain allegations contained in Lake Forest's fourth amended petition which was filed long before discovery was completed. Based upon this pleading and solely upon it and no other summary judgment evidence, the Court affirmed the summary judgment of the District Court.

REASONS FOR GRANTING WRIT

I. THE FIFTH CIRCUIT SUBSTANTIALLY DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN THAT ITS DECISION CONFLICTS WITH PRIOR HOLDINGS OF THE FIFTH CIRCUIT.

In basing its decision in this case solely on a portion of one of Lake Forest's pleadings, the Court has relied upon an allegation which subsequent discovery made irrelevant to Lake Forest's right to recover for a direct breach of loan agreement not dependent upon *any* oral arguments with regard to appraisals or reappraisals. The Court ignores the fact that in this case, there exists certain claims and defenses which we barred by *D'Oench, Duhme,* and others which are not. In refusing to recognize the distinction between the claims of Lake Forest, the Court has fallen into error and into conflict with other decisions of the Court.

As compelling evidence that the Court has confused an alleged oral agreement to accept appraisals or reappraisals with a separate direct breach of the written loan agreement can be demonstrated by this statement in the slip opinion on page 3790:

> "Judged according to the terms of the written agreement, GSA's complained of refusal to advance further funds to Lake Forest in 1981 based on a reappraisal of the property at that time (or, more precisely, its refusal to advance further funds without changing the terms of the loan agreement to require a personal guaranty) cannot be a breach of the agreement." [footnote omitted].

The fatal flaw in this statement by the Court is that it assumes that the right of GSA under the provisions of the loan agreement to refuse to accept a reappraisal and the right to demand a personal guaranty are one and the same thing.

These two entirely separate and distinct concepts, i.e., (1) the right to refuse to accept a reappraisal, and (2) the demand for a personal guaranty are not even governed by the same section of the loan agreement.

The right of GSA to refuse to accept a reappraisal is contained in §2.02 of the loan agreement which is also the section which required GSA to fund. §2.02 provides that GSA was:

> " . . . obligated to furnish to [Lake Forest] the amount of funds required to discharge and pay the costs of acquisitions and holding of said property."

This obligation to fund under the loan agreement was limited only as follows:

> "Notwithstanding anything contained herein to the contrary, Gibraltar shall not. . . . accept a reappraisal at a later date in order to increase the amount of funds to be advanced hereunder." See Appendix G, p. App. 22, infra.

On the other hand, the right of GSA to demand a personal guaranty is governed by §5.01 of the loan agreement which states:

> "*LIABILITY*. The monetary obligation of Owner shall be *non-recourse with Owner assuming no liability for repayment*. Gibraltar agrees to look

> exclusively to the security for repayment of such monetary obligations." [Emphasis added]. See Appendix G, p. App. 22, infra.

The analysis and conclusion by the Court that the concepts were the same thing was just wrong. To refuse to fund because of a concurrent refusal to accept a reappraisal under §2.02 was a right that GSA clearly had under the loan agreement. To refuse to fund without a personal guaranty was a breach under §5.01 which provided that the loans would be non-recourse.

In fact, footnote 1 which appears on page 3790 is also in error. The footnote states:

> "There is no claim (or evidence) of any written waiver or agreement to accept such a reappraisal."

To the contrary, Lake Forest would submit that there is a great deal of written evidence of either waiver or agreement depending upon how one prefers to classify it. The memorandum of January 11, 1979, from Ackerman to Leroy Land which refers both to "reappraisal" and "appraisal" and upon which a new loan was approved was either an agreement or a waiver of the right to refuse contained in §2.02. It certainly is in writing. See Appendix M, p. App. 45, infra. To the same effect is the memorandum dated November 14, 1980, from Ackerman to Leroy Land. See Appendix O, p. App. 54, infra; and the memorandum dated February 9, 1981 from Ackerman to E. Michael Lallinger. See Appendix P, p. App. 58, infra; and indeed the written action of the Senior Loan Committee on February 10, 1981. See Appendix Q, p. App. 60, infra.

The truth is that this case has never been about appraisals or reappraisals. They were always required by GSA. They were always accepted by GSA without question. What the case is about is two separate breaches of the loan agreement, i.e., (1) refusal to fund unless Lake Forest agreed to a termination of the agreement in contravention of §2.02, and (2) refusal to fund unless McMackin executed a 100% personal guaranty in contravention of §5.01 of the agreement.

The Fifth Circuit has continually insisted on treating this case as if the only claim or defense that Lake Forest had depended upon an oral waiver of the right to refuse to accept reappraisals and thereby brought it within the doctrine of *D'Oench, Duhme*. That would be correct if the facts showed that (1) Lake Forest had submitted an appraisal or reappraisal in order to obtain a new loan; (2) GSA had refused to accept the appraisal or reappraisal; and (3) the only ground that Lake Forest was advancing as its claim or defense was that GSA through Wisely and Ackerman had orally agreed that GSA would accept reappraisals. After discovery when it became clear that evidence of the breaches of the loan agreement had been reduced to writing and were contained in the records of GSA, the allegations of oral waiver became irrelevant and were not pursued by Lake Forest. Further, neither the allegations nor any proof of them was offered by Lake Forest, First Gibraltar, or the FDIC in the motions for summary judgment or in any brief on appeal.

The error of the Court in arriving at its decision is clearly demonstrated by the cases which are cited in the opinion to support the Court's conclusion that the estoppel doctrine of *D'Oench, Duhme* applied. In every case,

but one, the sole basis for the claim or defense depended on an oral agreement. In *Federal Deposit Insurance Corp. v. Hamilton*, 939 F.2d 1225, 1229 (oral agreement to fund line of credit within one day of loan request); *Federal Savings & Loan Insurance Corp. v. Griffin*, 935 F.2d 691, 697 (5th Cir. 1991), cert. denied, 112 S.Ct. 1163 (1992) (oral agreement to fund where written agreement provided only option on part of lender); *Porras v. Petroplex Savings Association*, 903 F.2d 380-381 (5th Cir. 1990) (oral agreement to loan additional $3 million); *Bowen v. Federal Deposit Insurance Corp.*, 915 F.2d 1013, 1016 (bank officer's oral promise to extend a loan); *Texas Refrigeration Supply, Inc. v. Federal Deposit Insurance Corporation*, 953 F.2d 975, 982 n. 13, 983 & n. 15 (5th Cir. 1992) (oral agreement not to accelerate maturity of loan). The only other case cited by the court was *Buchanan v. Federal Savings and Loan Insurance Corp.*, 935 F.2d 83, 86-7 n. 5 (5th Cir.) cert. denied sub nom. *Buchanan v. First Gibraltar, FSB*, 112 S.Ct. 639 (1991). This was a lis pendens case and not pertinent to Lake Forest's argument here.

For the above reasons, the Court committed error and rendered a decision that is clearly in conflict with the decisions of the Fifth Circuit which should control this case.

The Fifth Circuit case which is probably the closest on its facts to the instant is *Federal Savings & Loan Insurance Corporation v. Mackie*, 962 F.2d 1144 (5th Cir. 1992). In this case, *Mackie* made two separate types of claims or defenses against the lender. The first claim was that the lender had agreed to extend the time of the commitment for a permanent loan and then did not. This alleged agreement was oral. The second types of claims or

defenses were grounded in allegations that the lender had breached the permanent loan commitment agreement which was in writing. In reversing summary judgment granted by the District Court in favor of the lender the Court held as follows:

> "Mackie's other defenses, however, are not necessarily barred by *D'Oench Duhme* and were not directly discussed in *Locke*. Mackie alleges that Lamar breached the permanent loan commitment agreement and in doing so breached its duty to deal in good faith. Mackie also alleges that Lamar's failure to close the permanent loan and its posting the property for foreclosure constituted an unconscionable course of action in violation of the Texas Deceptive Trade Practices Act (TDTPA). In *Locke*, the court held that Locke's claims based on breach of fiduciary duty, bad faith and violation of the TDTPA were barred by the *D'Oench, Duhme* doctrine because all of these defenses were based on oral representations and promises made by the bank to Locke. *Locke*, 718 F.Supp. at 582. That is not the case here. We agree that Mackie cannot assert any defenses based on the alleged oral agreement that Lamar would transfer funds allocated to other items of the construction budget to the interest reserve. He can, however, assert defenses that are based on obligations contained in the written Loan Agreement, as long as he does not rely on any unrecorded agreements to support his allegations. *FDIC v. Laguarta*, 939 F.2d 1231, 1239 (5th Cir. 1991). Therefore, we remand Mackie's claims that Lamar breached the loan agreement, breached its duty of good

> faith, and violated the TDTPA to the district court."
> 962 F.2d at 1150-1151.

Other Fifth Circuit decisions which agree with the holding in *Mackie* and conflict with the holding in the instant case are *Resolution Trust v. Oaks Apartments Joint Venture*, supra, p. 1,000; *Hamman v. Southwest Gas Pipeline Company, Inc.*, 84 F.2d 299, 304 (5th Cir. 1987) *vacated in part on rehearing*, 832 F.2d 55.

II. THE FIFTH CIRCUIT SUBSTANTIALLY DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS IN THAT ITS DECISION CONFLICTS WITH DECISIONS OF OTHER UNITED STATES COURTS OF APPEALS.

The Courts of Appeals in other circuits have held that where a written agreement such as a loan agreement or a lease agreement impose bilateral obligations *D'Oench, Duhme*, may not be interposed to bar claims or defenses. In delineating the applicable rule the Court in *Howell v. Continental Credit Corporation*, 655 F.2d 743 (7th Cir. 1981) stated:

> "We believe these holdings are inapplicable, therefore, where the document the FDIC seeks to enforce is one, such as the lease is here, which facially manifests *bilateral* obligations and serves as the basis of the lessee's defense. In these situations, we do not believe the lessee should be held liable automatically simply because the FDIC has become a belated party to the transaction."
> 655 F.2d at 746.

The Court then went on to state as follows:

> "This is not a case such as *D'Oench* and its progeny where the maker's defense depended solely upon a secret or unrecorded agreement, usually oral, of which the FDIC could have had no notice. The defense appellant posits here arises directly and explicitly from the provisions of the leases which were in the bank's files and which the FDIC now seeks to enforce. We have not been presented with any persuasive reason why appellant's defense should not at least be tested at trial."
> 655 F.2d at 747.

In a recent decision the Tenth Circuit Court was faced with a set of facts that called for an analysis of the distinction between oral agreements and bilateral written agreements insofar as they governed the application of the *D'Oench, Duhme* doctrine.

The case of *Oklahoma Radio Associates v. Federal Deposit Insurance Corporation*, 967 F.2d. 685 (10th Cir. 1993) involved two separate promissory notes. On one note (Magnolia Note) the borrowers claimed there was an oral agreement to renew or roll over. On the other note (ORA Note) the borrowers claimed that although the face of the note reflected that it would mature in 10 months, there was written evidence in the form of a loan application and a letter from the bank officer indicating an agreement to amortize the note over a 5 year period.

The Court summarily disposed of the claim of an oral agreement to roll over the Magnolia Note and in so doing stated:

"In light of the foregoing analysis, however, we conclude that the district court correctly held that Magnolia was estopped to assert an oral agreement to roll its note into ORA's note. Unlike ORA, Magnolia can point to no written record contained in Citizen's loan files which could possibly have alerted the FDIC to a qualification not present on the face of the Magnolia note.

"As the Supreme Court stated in *Langley*, "one who signs a facially unqualified note subject to an unwritten and unrecorded condition upon its repayment has lent himself to a scheme or arrangement that is likely to mislead the banking authorities[.]" *Id.*, 484 U.S. at 93, 108 S.Ct. at 402. Magnolia is thus clearly estopped under *D'Oench* to rely on the oral agreement. Accordingly, we affirm the district court's grant of summary judgment to the FDIC on the Magnolia note and its accompanying guarantees by Collins and Armstrong."
987 F.2d 685 at 696.

However, with regard to the ORA Note which involved a written loan application and a bank officer's letter which indicated an agreement to a 5 year amortization, the Court reached the opposite conclusion. In reviewing the summary judgment of the District Court, the Court of Appeals held:

"In sum, the record does not support the summary judgment entered below against ORA on the basis of the *D'Oench* estoppel rule. There are genuine issues of material fact about the presence of the Osborne letter agreement and the

> loan application being in the loan files of Citizens, and manifesting the asserted bilateral agreement of ORA and Citizens."
> 987 F.2d 685 at 695.

In the present case it is undisputed that the loan agreement, promissory notes, deeds of trust, written memos, and actions of the loan committee were from the outset and remained in the official records of GSA and subsequently First Gibraltar.

It is respectfully submitted that both the *Howell* decision in the Seventh Circuit and the *Oklahoma Radio Associates* decision in the Tenth Circuit are in conflict with the decision in the present case on the application of the *D'Oench, Duhme* estoppel theory to a case involving bilateral obligations in written agreements.

CONCLUSION

For the reasons contained herein, this Court should exercise its discretion and this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

LAKE FOREST DEVELOPMENTS,
Plaintiff-Appellant,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION,
As Receiver for Gibraltar Savings Association, et al., Defendants,

First Gibraltar Bank, FSB,
Defendant-Appellee.

No. 91-1466.

United States Court of Appeals,
Fifth Circuit.

April 28, 1993.

(Filed Jun. 14, 1993)

Borrower sued Federal Deposit Insurance Corporation, as receiver of original lender, and also sued successor lender, claiming breach of loan agreement financing real estate development. The United States District Court for the Northern District of Texas, John H. McBryde, J., entered judgment for defendants and appeal was taken. The Court of Appeals, Garwood, Circuit Judge, held that: (1) *D'Oench, Duhme* doctrine precluded claim that lender had orally waived provision of contract stating that lender was not obligated to accept reappraisals of property for purpose of increasing loan commitment, and (2) notice of foreclosure sale was commercially reasonable, under Texas law.

Affirmed.

Appeal from the United States District Court for the Northern District of Texas.

Before GARWOOD and EMILIO M. GARZA, Circuit Judges.*

GARWOOD, Circuit Judge:

Plaintiff-appellant Lake Forest Developments (Lake Forest) filed this suit against Gibraltar Savings Association (GSA) in Texas state court in 1981 alleging that GSA had breached a loan agreement by failing to fully fund Lake Forest's development of 74 acres of real property. Lake Forest subsequently defaulted on the loan, and added claims of wrongful foreclosure after GSA non-judicially foreclosed upon and purchased the property at a trustee's sale. Thereafter, the case was removed to the district court below. Lake Forest brings this appeal from the district court's grant of summary judgment in favor of First Gibraltar Bank, FSB (First Gibraltar), which came into possession of the property through an acquisition agreement with the FSLIC upon GSA's insolvency. We affirm.

Facts and Proceedings Below

On March 30, 1977, GSA entered into a loan agreement with Johnson-Loggins, Inc., to finance development

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* Judge John R. Brown was on the panel that heard oral argument in this case, but passed away before the decision was entered, and the case is accordingly decided by a quorum. *See* 28 U.S.C. § 46(d).

of 74 acres of real property in Denton County, Texas for residential use. The loan agreement set forth Johnson-Loggins's obligations to submit a master development plan for GSA's approval, to be followed by more specific section plans and budgets for the parts of the property that were to be platted, showing detailed plans for streets, utility lines, etc. Section 2.02(a) of the agreement provided in part:

> "[GSA] shall be obligated to furnish to [Johnson-Loggins] the amount of funds required to discharge and pay the costs of acquisitions and holding of the said property, to pay taxes, insurance and other specific direct costs of the development as set out in Section 3.04 hereinafter. . . . Gibraltar shall not be obligated to advance in excess of eighty percent (80%) of the appraised value of the subject property according to the appraisal submitted to and accepted by [GSA]. [GSA] shall not accept a reappraisal at a later date in order to increase the amount of funds to be advanced hereunder."

The direct costs listed in Section 3.04 included, *inter alia*, the cost of land, cost of improvements, property taxes, advertising and sales expenses, and recording and title fees. Section 5.01 provided that the debt was to be nonrecourse, with GSA looking for repayment solely to the property and other security provided. On the same day, Johnson-Loggins executed a $1.8 million promissory note to GSA reflecting advances that it was contemplated GSA would thereafter periodically make for expenses in developing the property. The note also reflected that the debt was nonrecourse, with GSA agreeing to look solely

to the mortgage described in a deed of trust executed contemporaneously by Johnson-Loggins for repayment.

Several months later, this loan agreement was assigned to Lake Forest, a joint venture formed by John W. McMackin (McMackin) and Robert West (West) to develop and ultimately sell the property. In October 1977 McMackin, on behalf of Lake Forest, submitted to GSA a plan and basic budget for the first phase of development of the property. The first phase included development of 22.2 acres. A November 7, 1977 GSA memorandum reflects GSA's assent to proceed based on the plan submitted by McMackin.

In January 1979, McMackin submitted to GSA a plan and budget for the second phase of development. This plan included a request for additional funds based on a reappraisal of part of the property. A GSA memorandum dated January 11, 1979 discussing this proposal shows that the property is divided into three parcels, and that Parcel 1, on which it was originally contemplated that there would be 62 lots, had been reconfigured so that it would contain 106 lots. As a consequence of this changed land plan, a new appraisal of Parcel 1 had been performed, resulting in a new total appraised value for all three tracts of $3,015, 591. The memorandum reflects that the "Loan Request at 80%" based on the new appraisal was $2,412,470, representing a request for new funds in the amount of $610,870. The plan, budget, and request were all approved by GSA.

On May 29, 1979, Lake Forest executed a promissory note to GSA in the amount of $2.96 million, renewing and extending the original $1.8 million loan. Like the previous

note, this note reflected that it evidenced a nonrecourse debt and was accompanied by a deed of trust on the property.

In late 1980, Lake Forest sought further development funding that would have increased the total loan amount to approximately $3.3 million. A November 14, 1980 GSA memorandum summarizing the request shows the requested amount to be eighty percent of the property value as calculated in an October 1980 appraisal. This memorandum, from GSA Vice-President Charles Ackerman (Ackerman), recommended that GSA grant the loan as requested. A memorandum dated February 9, 1981 reflects that Ackerman had met with McMackin and was making the following recommendations (among others) for changes in the loan agreement when it was extended: (1) that McMackin would be 100 percent liable for the loan balance, and (2) that GSA would have no further obligation to make future loans. According to a GSA memo dated February 10, 1981, the GSA loan committee approved the refinancing on the conditions suggested by Ackerman, including personal liability by McMackin. McMackin submitted to the district court documents that he claims GSA demanded that he sign in order to receive the requested additional funding for Lake Forest. These documents included a full personal guaranty of the new loan and a termination of the March 1977 loan agreement.

McMackin refused to sign these documents. On August 11, 1981, Lake Forest filed suit in Texas state court against GSA for breach of contract, seeking specific performance or damages. Lake Forest subsequently defaulted in its payments on the May 1979 note, and GSA foreclosed and purchased the property at a trustee's sale

on June 7, 1983. GSA also foreclosed upon and subsequently purchased, at two judicial sales, a total of twenty-seven promissory notes that Lake Forest had collaterally assigned to GSA as additional security. Lake Forest then amended its complaint to add claims for wrongful foreclosure.

On December 27, 1988, the Federal Home Loan Bank Board declared GSA insolvent and appointed the FSLIC as receiver. The following day, the FSLIC entered into an agreement with what was the First Texas Bank. First State Bank acquired certain GSA assets, including the property formerly owned by Lake Forest, and took the name First Gibraltar.

In January 1989, the FSLIC intervened in Lake Forest's suit and removed it to federal court. On July 27, 1989, the district court granted Lake Forest's motion for leave to join First Gibraltar as a party necessary for adjudication of rights to the property. Lake Forest's fourth amended petition, its final pleading, included the following allegations: (1) that no appraisals were submitted for the $1.8 million note, and that appraisals submitted in November 1978 and March 1979 resulted in the increase of the note to $2.96 million in May 1979; (2) that Ackerman and GSA Executive Vice-President Wiley Wisely represented to McMackin that GSA would not refuse to advance development funds based on reappraisals if Lake Forest was developing the property according to the loan agreement; (3) that McMackin relied on these representations in continuing to develop the property in phases and submit new loan requests for the different phases; (4) that GSA "has failed and refused and

continues to fail and refuse to advance adequate development funds based upon acceptable reappraisals, or on any basis, for the development of the property in accordance with the March 30, 1977, Loan Agreement"; (5) that GSA "has waived and is estopped from relying on the provision of the March 30, 1977, Loan Agreement that it was not obligated to accept reappraisals based upon the words and actions of its agents who had actual or apparent authority to bind" GSA. The complaint requested that the trustee's sale of June 7, 1983, be declared void because GSA had no justifiable cause for initiating foreclosure proceedings, and because any default by Lake Forest was directly attributable to GSA's breach of the loan agreement. In addition, the petition asked the court to set aside the June 2, 1983, public sale of twenty-one of the promissory notes assigned to GSA as collateral because the notice of the sale was inadequate, and because Lake Forest's default was caused by GSA's prior breach of the loan agreement. Lake Forest further asserted a cause of action for breach of the covenant of good faith and fair dealing implied under the common law and under Tex. Bus. & Com.Code § 1.203 (Vernon 1968).

On March 26, 1991, after substitution of the FDIC for the FSLIC as receiver for GSA, the district court entered an order granting the FDIC's and First Gibraltar's respective motions for summary judgment. Lake Forest brings this appeal as to First Gibraltar only.

Discussion

This Court reviews a district court's grant of summary judgment *de novo*, taking the evidence and inferences to be drawn therefrom in the light most favorable

to the non-moving party, and determining whether the pleadings, depositions, answers to interrogatories, and affidavits show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Crenshaw v. General Dynamics Corp.*, 940 F.2d 125, 127 (5th Cir. 1991) (per curiam); Fed.R.Civ.P. 56(c). Summary judgment is proper "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). Here, the burden of proof was on Lake Forest, as plaintiff.

The primary argument offered by First Gibraltar in support of the summary judgment is that Lake Forest's complaint is barred by the *D'Oench, Duhme* doctrine. The *D'Oench, Duhme* doctrine was founded on the principle that when, for the accommodation of a bank, a person executes a facially binding and unqualified obligation, he should not thereafter be permitted to escape the FDIC's enforcement of that obligation by asserting that he agreed with the bank that it would not be enforced according to its terms. *D'Oench, Duhme & Co. v. Federal Deposit Insurance Corp.*, 315 U.S. 447, 458-60, 62 S.Ct. 676, 680, 86 L.Ed. 956 (1942). The doctrine has been applied to shield the FDIC and its assignees against unrecorded side agreements that tend to deceive creditors and the public banking authorities. *Federal Deposit Insurance Corp. v. Hamilton*, 939 F.2d 1225, 1228 (5th Cir.1991); *Federal Savings & Loan Insurance Corp. v. Griffin*, 935 F.2d 691, 697 (5th Cir.1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 1163, 117 L.Ed.2d 410

(1992); *Porras v. Petroplex Savings Association*, 903 F.2d 379, 380-81 (5th Cir.1990).

We must agree that the *D'Oench, Duhme* doctrine is fatal to Lake Forest's claim that GSA breached the March 1977 loan agreement. As the complaint itself demonstrates, Lake Forest relies upon an alleged oral waiver by GSA of the provision of the loan agreement stating that GSA was not obligated to accept reappraisals for the purpose of increasing the loan commitment under the agreement. The essence of *D'Oench, Duhme,* however, is that such oral side agreements "do not appear on the judicial radar screen." *Bowen v. Federal Deposit Insurance Corp.*, 915 F.2d 1013, 1016 (5th Cir.1990). Judged according to the terms of the written agreement, GSA's complained of refusal to advance further funds to Lake Forest in 1981 based on a reappraisal of the property at that time (or, more precisely, its refusal to advance further funds without changing the terms of the loan agreement to require a personal guaranty) cannot be a breach of the agreement.[1] Since Lake Forest's claims of wrongful foreclosure rest upon this alleged breach, they fail under *D'Oench, Duhme.*[2]

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[1] There is no claim (or evidence) of any written waiver or agreement to accept such a reappraisal. The only Loan Agreement of which there is any evidence is that of March 30, 1977.

[2] In some respects, this is not a classic *D'Oench, Duhme* case. Lake Forest is not trying to enforce an unrecorded side agreement against the FDIC or its assignee; rather, it is arguing that *GSA's* breach of its own oral promise rendered its foreclosure under the deed of trust wrongful, and thus prevented GSA from passing clear title to the property to the *FSLIC*, and then to First Gibraltar. (Lake Forest filed a notice of *lis pendens* on the prop-

Likewise, Lake Forest cannot, consistent with *D'Oench, Duhme,* seek to prove a breach of good faith or fiduciary duty by relying on these alleged representations that are contrary to the written loan agreement. *Cf. Langley v. Federal Deposit Insurance Corp.*, 484 U.S. 86, 108 S.Ct. 396, 400-01, 98 L.Ed.2d 340 (1987) (proof of alleged fraudulent misrepresentations not reflected in the loan documents was foreclosed by *D'Oench, Duhme's* statutory counterpart, 12 U.S.C. § 1823(e)); *Texas Refrigeration Supply, Inc. v. Federal Deposit Insurance Corporation,* 953 F.2d 975, 982 n. 13, 983 & n. 15 (5th Cir.1992).

The only claim by Lake Forest that does not rely on the alleged oral modification of the loan agreement, and thus is unaffected by *D'Oench, Duhme,* is the claim that GSA's notice of the foreclosure sale for the promissory notes was inadequate. The basis for this claim is that

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erty with the Denton County Clerk on July 11, 1983.) When the FDIC comes into possession of an *instrument, D'Oench, Duhme,* in prohibiting an obligor from engrafting additional unwritten terms onto the agreement, fulfills the public policy of enabling the FDIC to rely on the bank records. *See Hamilton,* 939 F.2d at 1229-30. In the present case, by contrast, the FSLIC came into possession of a tangible piece of property that was the subject of ongoing litigation.

Though the case is thus somewhat removed, both logically and in terms of policy considerations, from the core concerns of *D'Oench, Duhme,* decisions of this Court applying the doctrine in similar circumstances convince us that it must extend to encompass the present case. *See, e.g., Texas Refrigeration Supply, Inc. v. Federal Deposit Insurance Corp.*, 953 F.2d 975, 982 n. 13, 983 & n. 15 (5th Cir.1992); *Buchanan v. Federal Savings and Loan Insurance Corp.*, 935 F.2d 83, 86 & n. 5 (5th Cir.), *cert. denied sub nom. Buchanan v. First Gibraltar Bank, FSB,* ___ U.S. ___, 112 S.Ct. 639, 116 L.Ed.2d 657 (1991).

although Lake Forest received a notice stating that twenty-one of the twenty-seven promissory notes were to be sold in bulk at a public sale at 10:00 a.m. on June 2, 1983 at the door of the Denton County courthouse, the notice did not specify the maker, principal amount, interest rate, and maturity date of each. According to a May 27, 1983 letter from McMackin's attorney objecting to the notice, the lack of this information rendered the notice inadequate because the information would be required by a bidder in advance of the sale in order to compute a fair and reasonable value for the notes. The letter alleged that the absence of that information would detrimentally affect the price received for the notes. GSA did not correct any of the alleged deficiencies. It held the sale as scheduled, and was the only bidder.

In essence, Lake Forest does not challenge the notice it received of the sale, but rather raises a question whether, given this *public* notice, GSA's sale of the collateral was commercially reasonable. *See* Tex.Bus. & Com.Code § 9.504(c) (Vernon 1991) ("Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable.").

The notice in question stated that the promissory notes "are in amounts which vary between $12,250.00 and $30,600.00 and are at fixed interest rates between 9% and 11%." Although a prospective purchaser would certainly require more detailed information before making an actual bid, this notice would have sufficed to alert persons who might be interested in buying the notes to the

sale. Lake Forest does not allege that more detailed information would not have been available to a purchaser who made inquiries to GSA or who attended the sale. Without such allegations, Lake Forest has failed to raise a genuine issue of material fact regarding commercial reasonableness; in few, if any, sales could a buyer confidently make a bid based solely on a notice or advertisement.

Conclusion

We conclude, based on the summary judgment evidence presented by both sides, that Lake Forest failed to raise a genuine issue of material fact that could have entitled it to recovery. Accordingly, the summary judgment granted in favor of First Gibraltar is

AFFIRMED.

A true copy
Test:
Clerk, U.S. Court of Appeals,
Fifth Circuit

By /s/ Cindy Veasey
Deputy,

New Orleans Louisiana
JUN 11, 1993

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 91-1466

D.C. Docket No. CA4-89-94-A

LAKE FOREST DEVELOPMENTS,

Plaintiff-Appellant,

versus

FEDERAL DEPOSIT INSURANCE CORPORATION,
As receiver for Gibraltar Savings
Association, ET AL.,

Defendants,

FIRST GIBRALTAR BANK, FSB,

Defendant-Appellee.

(Filed Apr 28, 1993)

Appeal from the United States District Court
for the Northern District of Texas

Before GARWOOD and EMILIO M. GARZA, Circuit Judges.[1]

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[1] Judge John R. Brown was on the panel that heard oral argument in this case, but passed away before the decision was entered, and the case is accordingly decided by a quorum. See 28 U.S.C. § 46(d).

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the District Court in favor of First Gibraltar is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendant-appellee the costs on appeal to be taxed by the Clerk of this Court.

ISSUED AS MANDATE:
JUN 11 1993

April 28, 1993

A true copy

Test:

Clerk, U.S. Court of Appeals,
Fifth Circuit

By /s/ Cindy Veasey
Deputy Jun 11, 1993
New Orleans, Louisiana

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

LAKE FOREST DEVELOPMENTS,	$	
Plaintiff,	$	
	$	CIVIL ACTION
vs.	$	NO.
FEDERAL DEPOSIT INSURANCE	$	CA4-89-094-A
CORPORATION AS RECEIVER	$	(Filed
FOR GIBRALTAR SAVINGS	$	March 26, 1991)
ASSOCIATION, ET AL,	$	
	$	
Defendant.	$	

ORDER

Came on for consideration the motion of defendant First Gibraltar Bank FSB to dismiss or for summary judgment and the motion of plaintiff, Lake Forest Developments, for partial summary judgment. The court, having considered the motions, the responses thereto, and the summary judgment evidence, finds that First Gibraltar's motion for summary judgment should be granted and that plaintiff's claims against said defendant should be dismissed.

The court ORDERS that First Gibraltar's motion for summary judgment be and is hereby granted and plaintiff's claims against said defendant be and are hereby dismissed. Plaintiff shall bear all costs of court.

SIGNED March 26, 1991.

/s/ John McBryde
JOHN McBRYDE
United States District Judge

ENTERED ON DOCKET
4-2-91 PURSUANT
TO F.R.C.P. RULES
58 AND 79a

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

LAKE FOREST DEVELOPMENTS, Plaintiff,	$	
vs.	$	CIVIL ACTION NO. CA4-89-094-A
FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER FOR GIBRALTAR SAVINGS ASSOCIATION, ET AL,	$	(Filed March 26, 1991)
Defendant.	$	

ORDER

Came on for consideration the motion of defendant Federal Deposit Insurance Corporation as receiver for Gibraltar Savings Association ("FDIC receiver"), for summary judgment. The court, having considered the motion, the summary judgment evidence, and the response of plaintiff, Lake Forest Developments, thereto, finds that the motion is well-taken and should be granted. The court finds that FDIC receiver does not possess any assets from which recovery on a judgment against it can ever be had. *Triland Holdings & Co. v. Sunbelt Service Corp.*, 884 F.2d 205 (5th Cir. 1989).

The court ORDERS that FDIC receiver's motion for summary judgment be and is hereby granted and plaintiff's claims against FDIC receiver be and are hereby dismissed. As between plaintiff and FDIC receiver, all costs shall be borne by plaintiff.

SIGNED March 26, 1991.

/s/ John McBryde
JOHN McBRYDE
United Sates District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

LAKE FOREST DEVELOPMENTS,	$	
Plaintiff,	$	
	$	CIVIL ACTION
vs.	$	NO.
FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER FOR GIBRALTAR SAVINGS ASSOCIATION; ET AL,	$	CA4-89-094-A
	$	(Filed
	$	March 26, 1991)
	$	
	$	
Defendant.	$	

JUDGMENT

In accordance with the court's orders of even date herewith,

The court ORDERS, ADJUDGES and DECREES that plaintiff's claims against defendants in the above-styled and numbered action be, and are hereby, dismissed. Plaintiff shall bear all costs of court.

SIGNED March 26, 1991.

/s/ John McBryde
JOHN McBRYDE
United States District Judge

ENTERED ON DOCKET
4-2-91 PURSUANT
TO F.R.C.P. RULES
58 AND 79a.

APPENDIX F

IN UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-1466

LAKE FOREST DEVELOPMENTS,

Plaintiff-Appellant,

versus

FEDERAL DEPOSIT INSURANCE CORPORATION,
As receiver for Gibraltar Savings
Association, ET AL.,

Defendants,

FIRST GIBRALTAR BANK, FSB,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING

(Filed Jun 1, 1993)

Before GARWOOD and EMILIO M. GARZA, Circuit Judges.*

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* Judge John R. Brown was on the panel that heard oral argument in this case, but passed away before the decision was entered, and the case is accordingly decided by a quorum. See 28 U.S.C. § 46(d).

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in above entitled and numbered cause be and the same is hereby DENIED.

ENTERED FOR THE COURT:

/s/ Walt Garwood
United States Circuit Judge

APPENDIX G

LOAN AGREEMENT

THIS AGREEMENT made and entered into as of the 30th day of March, 1977, by and between GIBRALTAR SAVINGS ASSOCIATION, a Texas savings and loan association, hereinafter called "Gibraltar," and JOHNSON-LOGGINS, INC., a Delaware Corporation, hereinafter called "Owner",

WITNESSETH:

In consideration of the premises and the mutual covenants and agreements hereinafter set forth, the parties hereto hereby agree as follows:

ARTICLE I

CREATION, PURPOSE AND SCOPE OF AGREEMENT

Section 1.01. CREATION – There has heretofore been acquired by Owner that certain property described in Exhibit "A" hereto (hereinafter sometimes called "said property" or "the development"), which Exhibit is incorporated herein by reference for all purposes. Said property shall be developed and sold as hereinafter provided. The purpose and scope of this Agreement is to set out the obligations, responsibilities, rights and entitlements of the parties hereto. It is intended that Owner, with financing by Gibraltar as hereinafter provided, will develop and sell said property in accordance with the terms hereof.

Section 1.02. PURPOSE AND SCOPE – This Agreement shall be limited strictly to the financing, developing, operating and selling or otherwise disposing of said property, and shall not be extended by implication or otherwise except by the written agreement of the parties hereto.

Section 1.03. LENDER/BORROWER RELATIONSHIP – The relationship between the parties under this Agreement shall be that of lender/borrower and in no event interpreted as that incident to a partnership or joint venture. Except as otherwise expressly and specifically provided in this Agreement, neither of the parties have any authority to act for, or to assume any obligation or responsibility on behalf of the other party.

Section 1.04. DECISIONS AND APPROVALS –

(a) The following matters ("Major Decisions") shall require the unanimous approval of both parties hereto:

(1) Adoption of the Master Plan of Development;

(2) Adoption of each Section plan;

(3) Adoption of each Section Capital Improvement Budget;

(4) Adoption of each Section Operating Budget;

(b) Owner shall submit the various Budgets in form and content as hereinafter set forth, and Gibraltar shall have the right to approve said Budgets under terms provided hereinafter. All funds advanced from the loan hereafter described shall be advanced for

the purpose of paying those items specifically approved in the budgets.

(c) All other decisions regarding the use, sale and development of the said property shall be made by Owner. Gibraltar shall, however, upon request of Owner provide its recommendations and guidance in other areas of operation concerning the said property.

ARTICLE II

DEVELOPMENT AND SALE OF THE SAID PROPERTY

Section 2.01. DEVELOPMENT OF THE PROPERTY –

(a) As to said property a Master Plan for the development thereof has been, or will be, submitted by Owner and must be acceptable to Gibraltar.

(b) Upon approval of the Master Plan as aforesaid, Owner shall cause to be prepared, at the expense of the development, the following:

(1) A section plan ("Section Plan") which shall show the specific section or sections of the property which are then proposed to be platted, and detailed plans for Utility lines, streets and other capital improvements;

(2) A budget (the "Section Capital Improvement Budget") which shall show the estimate, as made by Owner,

of the anticipated costs of the improvements proposed for the particular section, as contemplated by the Section Plan;

(3) A budget (the "Section Operating Budget") which shall show the estimate, as made by Owner, of the anticipated receipts and disbursements of the development in connection with the operation of that particular section (excluding costs of capital improvements) for the next calendar year.

If Gibraltar fails or refuses to approve any Section Plan, or any above designated Budget, then the Owner shall not proceed to implement such Plan or Budget; however, if such Plan or Budget has been approved by Gibraltar, then Owner shall proceed to implement such Plan and Budget, and the further consent or approval of Gibraltar to the detailed actions necessary to implement such Plan or Budget and the method or manner of performance by Owner shall not be required, provided that such actions in performance are consistent with such approved Plan and Budgets.

(c) After the said property has been platted in accordance with the Section Plan, Owner shall cause the improvements therefor to be constructed so that said property will be improved into lots ready for sale.

(d) Owner shall not expend any funds advanced by Gibraltar or incur any liabilities on behalf of the development so as to cause any lien superior to Gibraltar's lien to be placed on the said property.

SECTION 2.02. FINANCING OF PURCHASE AND DEVELOPMENT –

(a) Gibraltar shall be obligated to furnish to Owner the amount of funds required to discharge and pay the costs of acquisitions and holding of the said property, to pay taxes, insurance and other specific direct costs of the development as set out in Section 3.04 hereinafter, such funds to be represented by a note or notes, the principal of which shall be due and payable on or before five years from date hereof, and as security therefor Gibraltar shall have liens against the property. The liens shall be created by mortgage instruments in form and substance as required by Gibraltar, Notwithstanding anything contained herein to the contrary, Gibraltar shall not be obligated to advance in excess of eighty percent (80%) of the appraised value of the subject property according to the appraisal submitted to and accepted by Gibraltar. Gibraltar shall not accept a reappraisal at a later date in order to increase the amount of funds to be advanced hereunder. Notwithstanding the face amount of the loans made pursuant hereto, in instances where liens superior to those of Gibraltar encumber the said property, there shall be withheld by Gibraltar funds in a sufficient amount to satisfy such prior indebtednesses as specifically set forth in the notes. In the event that Owner fails to pay and discharge any such prior indebtedness, or if Gibraltar deems it to be in its best interest to retire such prior indebtedness, then Gibraltar at its option may pay and discharge the same

from these restricted funds without waiver of any of its rights hereunder, and the sums so expended for such purposes shall become a part of the debt evidenced by the loan and shall draw interest from date so expended until paid.

(b) All monies advanced by Gibraltar pursuant to this Agreement shall earn interest only for the time such funds are actually outstanding; and same shall draw interest at the rate of one and one-half percent (1½%) per annum above the prime rate changed from time to time by the Federal Home Loan Bank to its member associations for advances for terms of one (1) year. Such rate will change from time to time on the same dates that the Federal Home Loan Bank Board changes its rates.

(c) All loans to be made by Gibraltar hereunder must comply with applicable governmental rules and regulations to which it is subject as a savings and loan association, including appraisal and lending limitations.

Section 2.03. PARTIAL RELEASES –

(a) Partial releases shall be given in accordance with and pursuant to the schedule contained in Exhibit "B" attached hereto and made a part hereof.

Section 2.04. PERMANENT FINANCING, RIGHT OF FIRST REFUSAL – Gibraltar shall have the right of first refusal on all permanent loans on residential or commercial improvements located on the said property where it is within the ability of Owner to direct such

loans, such right to be subject to Gibraltar's willingness to furnish interim and permanent financing in line with current market and competitive conditions.

ARTICLE III
ACCOUNTING, REPORTS AND DIRECT COSTS

Section 3.01. ACCOUNTING – Owner shall maintain all books of account and other financial records of the development. Such books of account and other records shall be open to inspection by Gibraltar at any time during reasonable business hours at Owner's office. At the request of either party, but not more often than one time each calendar year, such books of account and other records shall be audited by a firm of independent certified public accountants acceptable to both parties hereto. Such books of account shall clearly indicate that all funds advanced by Gibraltar hereunder have been utilized pursuant to the approved Budgets set forth above.

Section 3.02. OVERHEAD COSTS AND DIRECT COSTS

(a) Owner shall not be entitled to receive reimbursement from the loan proceeds for overhead costs or similar indirect expenses relating to the services connected with the development.

(b) Out-of-pocket direct costs or expenses reasonably incurred by Owner in the performance of any of its duties hereunder and specifically approved in the Budgets shall be reimbursed to it from the loan proceeds and shall be considered as an expense of the development. The estimated amount of

costs of Owner which are subject to reimbursement under this Section shall be included in the Budgets which Owner submits to Gibraltar for approval. Such direct costs are more specifically set out in Section 3.04 hereafter.

Section 3.03. REPORTS – Owner shall deliver to Gibraltar, not less often than one time each calendar month, a report of the activities of the development for the immediate preceeding calendar month. Such report shall contain such operational and accounting details as Gibraltar reasonably requests. At the request of Gibraltar, Owner shall, at reasonable intervals, convene meetings of the parties hereto for a discussion of such report and all activities of the development relative thereto or otherwise.

Section 3.04. DEFINITION OF DIRECT COSTS – Direct costs as mentioned in Section 3.02(b) above will be limited to the following:

(a) cost of land;

(b) cost of improvements

(c) advertising

(d) property taxes;

(e) sales expenses, and commissions

(f) recording and title fees;

(g) insurance expense;

(h) payroll taxes;

(i) audit or audits provided for in Paragraph 3.01 above;

(j) seller's closing costs and sales of said property;

(k) general upkeep and maintenance of said property including utilities;

(l) general costs of administration of the development;

(m) attorney's fees incurred in connection with this development;

(n) reasonable and necessary expense of preparing a master plan.

The amount of such direct costs as set out above must be included in the Budgets provided for above, and approved by Gibraltar. The payment of such costs once budgeted and approved must be applied for and paid on a current monthly basis. All other expense, unless specifically approved by Gibraltar, will be deemed to be overhead and will not be an expense of the development.

ARTICLE IV
TERMINATION

Section 4.01. DEFAULT AND TERMINATION - In the event of (a) insolvency or appointment of a receiver of Owner, (b) the execution by Owner of an assignment for the benefit of creditors, (c) the institution of proceedings by or against Owner under any bankruptcy, reorganization, debtor's relief or insolvency law now or hereafter existing, (d) the appointment of a receiver of the said property, (e) the default under the legal documents evidencing the loans to be made under this Loan Agreement, or (f) failure to perform the covenants and/or agreements contained in this Loan Agreement, this agreement shall

automatically terminate and Gibraltar shall have its remedies under the loan documents.

ARTICLE V
GENERAL

Section 5.01. LIABILITY – The monetary obligation of Owner shall be non-recourse with Owner assuming no liability for repayment. Gibraltar agrees to look exclusively to the security for repayment of such monetary obligations.

Section 5.02. SEVERABILITY – If any provision of this Agreement or the application thereof to any person or circumstance shall be invalid or unenforceable to any extent, the remainder of this Agreement and the application of such provision to other persons or circumstances shall not be affected thereby and shall be enforced to the greatest extent permitted by law.

Section 5.03. ENTIRE AGREEMENT – This Agreement contains the entire Agreement between the parties hereto relative to the said property. No variations, modifications or changes herein or hereof shall be binding upon either party hereto unless set forth in a document duly executed by an authorized officer or other agent of such party.

Section 5.04. TERMINOLOGY – All personal pronouns used in this Agreement, whether used in the masculine, feminine or neuter gender, shall include all genders; the singular shall include the plural and vice versa. Titles of Articles and Sections are for convenience

only and neither limit nor amplify the provisions of the Agreement itself.

Section 5.05. BINDING AGREEMENT – This Agreement shall inure to the benefit of and be binding upon the undersigned parties and their respective heirs, executors, successors and assigns if any permitted under this Agreement. Whenever in this instrument a reference to any party is made, such reference shall be deemed to include a reference to the heirs, legal representatives, successors and assigns of such party; however, this Section does not constitute a consent to any assignment or transfer other than pursuant to and in accordance with the other provisions of this Agreement.

EXECUTED at Houston, Texas, in duplicate originals on the date first set forth above.

ATTEST:

/s/ Nita Chessher
Asst. Secretary

ATTEST:

/s/ Richard Therrien
Asst. Secretary

GIBRALTAR SAVINGS ASSOCIATION

By: /s/ Wylie R. Wisely
Exec. V-President

JOHNSON-LOGGINS, INC.

By: /s/ J.M. Tipps
Vice President

APPENDIX H

ASSIGNMENT OF LOAN AGREEMENT

WHEREAS, GIBRALTAR SAVINGS ASSOCIATION, a Texas savings and loan association, hereinafter called "Gibraltar" entered into a loan agreement with JOHNSON-LOGGINS, INC., a Delaware corporation therein called "owner" and herein called "assignor" dated as of March 30, 1977 (the "loan agreement"), the loan agreement relating to the property described on Exhibit "A" which is attached hereto and made a part hereof for all purposes which property is hereinafter referred to as the "property";

WHEREAS, assignor has conveyed all of its rights, titles and interest in and to the property unto JOHN W. McMACKIN and BEN HOGAN hereinafter collectively referred to as "assignee" and assignor desires to transfer unto assignee all of its rights, benefits and entitlements under the loan agreement;

NOW THEREFORE, know all men by these presents that for and in consideration of the mutual benefits and detriments the undersigned assignor, assignee and Gibraltar agree as follows:

(1) Assignor has transferred, assigned and conveyed and does hereby transfer, assign and convey unto assignee all of the rights and entitlements and benefits of assignor under the loan agreement.

(2) Assignee assumes all obligations of assignor under the loan agreement and any instruments to be executed in connection therewith, subject, however, to the

limitation of liability contained in Section 5.01 of the loan agreement.

(3) Gibraltar consents to this assignment and agrees that from and after the date hereof assignor shall have no liability or obligation under the loan agreement or any instruments executed in connection therewith.

This agreement shall be binding upon and inure to the benefit of the respective heirs, legal representatives, successors and assigns of the parties hereto.

Executed in Houston, Harris County, Texas as of March 30, 1977.

JOHNSON-LOGGINS, INC.

By: /s/ J.M. Tipps
Vice President "Assignor"

/s/ John M. McMackin
JOHN W. McMACKIN
"Assignee"

/s/ Ben Hogan
BEN HOGAN "Assignee"

GIBRALTAR SAVINGS
ASSOCIATION

/s/ Wylie R. Wisely

APPENDIX I

$1,800,000.00 Houston, Harris County, Texas March 30, 1977

JOHNSON-LOGGINS, INC. (hereinafter called "Maker"), for value received, agrees to pay on or before March 30, 1978, and as herein provided, unto the order of GIBRALTAR SAVINGS ASSOCIATION (hereinafter called "Payee"), at its office at 2302 Fannin Street, Houston, Harris County, Texas, in coin or currency of the United States of America which at the time of payment is legal tender for the payment of public and private debts, the principal sum of ONE MILLION EIGHT HUNDRED THOUSAND AND NO/100 DOLLARS ($1,800,000.00). Interest on the principal balance of this note shall be at one and one-half percent (1½%) above the prime rate charged from time to time by the Federal Home Loan Bank to its member associations for advances for terms of one (1) year (which interest rate shall be adjusted or altered each time the Federal Home Loan Bank changes its rate on such one (1) year advances). Interest at the rate of ten percent (10%) per annum shall be earned on all past due principal and interest from and after maturity until paid.

Accrued interest shall be payable on the first day of October, 1977, and quarterly thereafter until all sums called for hereunder have been paid in full as well as at maturity hereof.

Maker shall be entitled to a total of four (4) successive renewals of the maturity of this note of one (1) year each, provided that it is current in all respects and Maker is not in default under the terms of the Deed of Trust

below mentioned on the beginning date of each renewal period.

This is a non-recourse note with Maker assuming no liability for repayment and Payee agreeing to look exclusively to the security hereinafter described for repayment.

In the event default is made in the payment of any interest installments or in the performance of any of the obligations, covenants or agreements legally imposed by the terms of this note or in the Deed of Trust securing its payment, at the option of the holder, the whole indebtedness evidenced hereby may be declared due and payable without presentment or demand for payment or notice of the exercise of such option by the holder, and may be collected by suit or by the exercise of the powers contained in the Deed of Trust.

Not all of the principal of this note is to be advanced on date hereof. The principal of this note represents funds which, it is contemplated, will be advanced by Payee to Maker hereof from time to time incident to the property described hereinafter and construction of certain improvements thereon. Such advances shall be made in increments which will aggregate in total the principal sum of this note. Each such sum so advanced shall constitute a part of the principal hereof and shall bear interest from the respective date of the advancement thereof.

The payment of this note is secured by a second lien described in that certain Deed of Trust of even date herewith conveying in trust to Edgar W. Monteith, Trustee for Payee, the property described in Exhibit "A" attached hereto and incorporated herein for all purposes.

Said lien is second and inferior to those certain outstanding liens on said property being (i) vendor's lien retained in deed dated October 23, 1973, executed by Harry G. Seeligson, et al to Johnson-Loggins, Inc., securing note of even date in the amount of $1,169,086.42 payable to Harry G. Seeligson, et al, additionally secured by (ii) Deed of Trust of even date to William F. Douglas, Trustee, filed for record in Denton County, Texas, on November 12, 1973, under County Clerk's File No. 22518. It is expressly agreed and understood between the parties hereto that Payee shall pay all of the unpaid balance, principal and interest, now owing upon said note and the liens securing same. It is agreed that in the event of default by the said Payee in payment of said note and the liens securing same and/or performance of the obligations imposed by and set forth in said note and the mortgage instruments securing same, and in the further event that Maker shall pay all or part of the unpaid balance owing upon said note, the amount of such payment shall be deducted from the amount owing hereunder.

Any provision of this note to the contrary notwithstanding, Maker shall not pay or be obligated to pay, and the holder of this note shall not collect and does not intend that the Maker pay, interest in an amount in excess of the maximum interest rate allowed by the usury laws of the State of Texas. If at any time it is determined that the interest called for by this note is in excess of the maximum rate of interest lawfully payable under this note by Maker pursuant to the laws of the State of Texas applicable at the time, then, at the option of the holder of this note, Maker shall either (1) pay interest at such

maximum rate of interest, or (2) make the payments as originally contemplated but apply on the unpaid principal balance the part of the amount so determined to be in excess of such maximum rate of interest, with any excess to be returned to Maker.

It is hereby specially [sic] agreed that if this note is placed in the hands of an attorney for collection, or if collected by suit or through the Probate or Bankruptcy Court, Maker agrees to pay in addition to the amount of principal and interest due hereon the amount of attorney's fees and costs reasonably incurred for such collection, but in no event less than ten percent (10%).

Maker hereby waives presentment for payment, demand, protest, diligence, notice of the exercise of the option to accelerate the maturity of this note and suit.

ATTEST: JOHNSON-LOGGINS, INC.

/s/ Richard Therrien
Secretary

By /s/ J.M. Tipps
Vice President

(SEAL)

APPENDIX J

VOL 856 PAGE 280

THE STATE OF TEXAS	)	KNOW ALL MEN BY
COUNTY OF DENTON	)	THESE PRESENTS:
	)	DEED RECORDS

23320

QUITCLAIM DEED

THAT BEN HOGAN of the County of Tarrant, State of Texas, for and in consideration of the sum of TEN DOLLARS ($10) in hand paid by the grantee herein named, the receipt of which is hereby acknowledged, has QUITCLAIMED, and by these presents does QUITCLAIM unto JOHN W. McMACKIN of the County of Tarrant, State of Texas, all of his right, title, and interest in and to the real property situated in Denton County, Texas, more particularly described in Exhibit A attached hereto.

This conveyance is made subject to the extent the same are valid and enforceable to the following:

(1) A Deed of Trust from Johnson-Loggins, Inc., to Edgar Monteith as Trustee, which secures a non-recourse note in the original principal amount of $1,800,000 executed by Johnson-Loggins, Inc., dated March 30, 1977, and bearing interest and payable as therein set out; and

(2) Any and all restrictions, easements, rights-of-way, conditions, liens, or reservations reflected by instruments of record with the County Clerk of Denton County, Texas.

TO HAVE AND TO HOLD all of his rights, title, and interest in and to the property and premises described on

Exhibit A attached hereto unto the said grantee, his heirs and assigns forever, so that neither I nor my heirs, legal representatives, or assigns shall have, claim, or demand any right or title to the aforesaid property, premises, or appurtenances, or any part thereof.

EXECUTED this 14 day of September, 1977, effective the 30th day of March, 1977.

/s/ Ben Hogan
BEN HOGAN

THE STATE OF TEXAS)
)
COUNTY OF TARRANT)

BEFORE ME, the undersigned, a Notary Pubic in and for said County and State, on this day personally appeared BEN HOGAN, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this the 14th day of September, 1977.

/s/ Melinda Watts
Notary Public in and for
Tarrant County, Texas

APPENDIX K

THE STATE OF TEXAS)
)
COUNTY OF DENTON)

VOL 866 page 176

KNOW ALL MEN BY THESE PRESENTS:

DEED RECORDS 29493

SPECIAL WARRANTY DEED

THAT JOHN W. McMACKIN of the County of Tarrant, State of Texas, for and in consideration of the sum of Ten Dollars ($10) and other good and valuable consideration to the undersigned paid by the Grantee herein named, the receipt of which is hereby acknowledged, has GRANTED, SOLD, and CONVEYED, and by these presents does GRANT, SELL, and CONVEY, unto LAKE FOREST DEVELOPMENTS, a Joint Venture composed of JOHN W. McMACKIN and ROBERT G. WEST, both of Tarrant County, Texas, all of the real property located in Denton County, Texas, more particularly described on Exhibit A attached hereto and made a part hereof for all purposes.

This conveyance is made by the Grantor and accepted by the Grantee subject, to the extent the same are valid and enforceable, to the following:

(1) A Deed of Trust from Johnson-Loggins, Inc., to Edgar Monteith as Trustee, which secures a non-recourse note in the original principal amount of $1,800,000 executed by Johnson-Loggins, Inc., dated March 30, 1977, and bearing interest and payable as therein set out; and

(2) Any and all restrictions, easements, rights-of-way, conditions, liens, or reservations reflected by instruments of record with the County Clerk of Denton County, Texas.

TO HAVE AND TO HOLD the premises described on Exhibit A attached hereto and made a part hereof for all purposes, together with all and singular the rights and appurtenances thereto in anywise belonging, unto the said Grantee, its successors and assigns forever; and JOHN W. McMACKIN does hereby bind himself, his heirs and assi ns, to WARRANT and FOREVER DEFEND all and singular the said premises unto the said Grantee, its successors and assigns, against every person whomsoever lawfully claiming, or to claim, the same or any part thereof, by, through, or under me, but not otherwise.

EXECUTED this 30th day of November, 1977, effective the 30th day of March, 1977.

/s/ John W. McMackin
JOHN W. McMACKIN

THE STATE OF TEXAS)
)
COUNTY OF TARRANT)

BEFORE ME, the undersigned, a Notary Public in and for said County and State, on this day personally appeared JOHN W. McMACKIN, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this the 30th day of November, 1977.

/s/ Melinda Watts
Notary Public in and for
Tarrant County, Texas

(SEAL)

My commission expires:

October 25, 1979

APPENDIX L

MEMORANDUM

TO: Mr. Edgar Monteith

FROM: Charles R. Ackerman

DATE: November 7, 1977

RE: Hogan – Mc Mackin Tract

Mr. Mc Mackin was in on November 4 and reviewed his first 40 lot section of 22.2 acres. We have agreed to proceed on this work.

He is requesting a name change on the Loan Agreement, and Assignment of Loan Agreement to "Lake Forest Developments, A Joint Venture", instead of the existing "John Mc Mackin".

Will you please make the necessary amendments to the various documents to effect this change? I will provide any information you require.

sdg

cc: Wylie Wisely
Nita Chessher

APPENDIX M

MEMORANDUM

TO: Leroy Land

FROM: Charles R. Ackerman

SUBJ: Lake Forest Village – Loan Feasibility Study (John McMackins tract at Trophy Club

DATE: January 11, 1979

I. Scope

This memo reviews a loan request for $2,412,240. It is basically an increase in an existing loan, where a part of the property (Parcel) has been reappraised due to a changed land plan, yielding 106 lots instead of the original planned 62 lots. The amount of new money requested is $610,870.

II. Review of Existing Loan

A. General

Loan #4813 was made in May, 1977 as an acquisition and development loan based on 73.35 acres, for $1,802,000. There were three (3) parcels:

1. Original land configuration

Parcel 1 - 36.47 acres - 62 lots
Parcel 2 - 24.15 acres - 54 lots
Parcel 3 - 12.73 acres - 32 lots
73.35 acres 148 Total lots

1.344 acres deeded at a later date

74.694 Total acres

2. Current land configuration

Parcel 1- Phase 1 -	14.17 acres	43 lots	(13 sold)
Parcel 1- Phase 2 -	14.844 acres	35 lots	(none sold)
Parcel 1- Phase 4 -	8.8 acres	28 lots	(none sold)
	37.814 acres	106 lots	
Parcel 2 -	24.15 acres	54 lots	
Parcel 3 -	12.73 acres	32 lots	
Total	74.694 acres	192 lots	

B. Current Appraisal (dated November 20, 1978)

The appraisal reflects the following values:

Phase 1 - 30 lots -ASP	$24,067	722,010
Phase 2 - 35 lots -ASP	19,986	699,510
Phase 4 - 28 lots -ASP	16,036	449,008
93		1,870,528

The appraisal then shows a 2% quarterly compounded appreciation factor, based on a sales period of 26 months ending February 1981. (Please refer to page 26 of the appraisal)

$ 1,870,528	Current Value
147,563	Appreciation factor
$ 2,018,091	Total Value

C. Proposed Loan

$ 2,018,091	Gross sales potential, new appraisal
997,500	Value of Parcels 2 & 3, old appraisal
$ 3,015,591	Total Appraisal

$ 2,412,470 Loan request at 80%

D. Status of Current Loan

$ 1,466,576 Loan Balance December 31, 1978
92,006 Draw #12 now in house

$ 1,558,582 Projected loan balance

E. Use of Funds

$ 2,412,470 Proceeds of proposal loan
- 1,558,582 Repay existing loan
853,888 Remaining funds
- 108,000 Complete Phase I but primarily for commission and carry on loan.
- 375,000 Complete Phase II estimated sale commission and carry.
- 209,132 Complete Phase IV estimated sales commission and carry.

$ 161,756 Raw land carry & G&A

The developer estimated raw land carry and G&A to be $220,000 during the period. This means $58,244 will have to be provided by the developer.

III. Summary and Recommendations

I call your attention to the manner in which the price escalation is computed. (see page 26 of appraisal) I also point our[sic] that the proposed loan would use the value of 86 additional lots to be developed in Parcel 2 & 3 but that funds to develop these are not available from the proceeds of this loan.

Finally, I point our [sic] that it is imperative that funds earmarked be used for the purpose of developing the property and not used for interest on the

raw land loan; this would give us an extremely high base if we were, for any reason, required to take back the property.

Parcel 2 - 24.15 acres
Parcel 3 - 12.73 acres

36.88 acres

$997,500	Appraised Value
798,000	Loan amount @80%
$ 21,638	Per acre value, before any further interest is added

Please advise me of your feelings in this matter.

CRA/hm

cc: W.Wisely
M. Barsi

Enclosure: (Previously hand carried)
Appraisal of Parcel I,
dated November 13, 1978

APPENDIX N

PROMISSORY NOTE

$2,960,000.00 Houston, Harris County, Texas May 29, 1979

FOR VALUE RECEIVED, the undersigned, John W. McMackin, for and on behalf of LAKE FOREST DEVELOPMENTS, a Joint Venture composed of John W. McMackin and Robert G. West, (hereinafter called "Maker"), hereby promises to pay on or before five (5) years from the date hereof, to the order of GIBRALTAR SAVINGS ASSOCIATION, (hereinafter called "Payee"), at its principal office at 2302 Fannin Street, Houston, Harris County, Texas, or at such other place as the holder hereof may from time to time designate, the principal sum of TWO MILLION NINE HUNDRED SIXTY THOUSAND AND NO/100 DOLLARS ($2,960,000.00) together with interest on all amounts remaining unpaid hereon from time to time from the date hereof until maturity, payable quarter-annually on the first day of each January, April, July, and October during the term hereof and at maturity at a rate per annum (based on a year of 360 days) through date of maturity, which interest rate shall be the greater of either:

(a) one and one-half percent (1-1/2%) above the Federal Home Loan Bank Board rate for one year money during the quarter immediately preceding the date on which such interest is due; or,

(b) nine percent (9%) per annum.

If any payment of principal or interest on this note shall become due on a Saturday, Sunday or public holiday under the laws of the State of Texas or on any other day

on which banking institutions are authorized or obligated by law to close in the State of Texas, such payment shall be made on the next succeeding business day and such extension of time shall in such case be included in computing interest in connection with such payment.

Payments of both principal and interest are to be made in lawful money of the United States of America.

In the event Maker shall (i) default in the payment of any installment, or in the performance of any of the obligations, covenants or agreements legally imposed by the terms of this note or the Deed of Trust securing its payment, or (ii) apply for or consent in writing to the appointment of a receiver, trustee, or liquidator of Maker or the real property securing this note, or (iii) file a voluntary petition in bankruptcy, or admit in writing Maker's inability to pay Maker's debts as they come due, or (iv) make a general assignment for the benefit of creditors, or (v) file a petition or answer seeking reorganization or re-arrangement with creditors or taking advantage of any insolvency law, or (vi) file an answer admitting the material allegations of a petition filed against Maker in any bankruptcy, reorganization, insolvency or similar proceedings, at the option of the holder, the whole indebtedness evidenced hereby may be declared due and payable whereupon the entire unpaid principal balance of this note and all interest accrued thereon shall thereupon at once mature and become due and payable without presentment or demand for payment or notice of the intent to exercise such option or notice of the exercise of such option by the holder, or notice of any kind, all of which are hereby expressly waived by Maker, and may be collected by suit or other

legal proceedings or by the exercise of the powers contained in the Deed of Trust.

/s/ JWMc
Initialed for Identification

It is further agreed that upon this note becoming or being declared due and upon the same being placed in the hands of an attorney for collection (whether or not suit is filed), or if collected by suit or legal proceedings or through the Probate or Bankruptcy Court, the Maker of this note agrees to pay an additional amount equal to ten percent (10%) of all sums then due hereon, including principal and interest, as attorney's fees and expenses of collection.

A portion of the principal of this note represents funds which it is contemplated will be advanced by Payee to Maker from time to time for the interest carry on this indebtedness. Each such sum so advanced shall constitute a part of the principal hereof and shall bear interest from the respective date of the advancement thereof.

A portion of the principal of this note represents funds presently owing to Payee evidenced by a note executed by Johnson-Loggins, Inc. dated March 30, 1977, in the original amount of $1,800,000.00, ("Original Note"). This note represents a partial renewal, extension and rearrangement of said Original Note according to the terms hereof. A release of the security property hereinafter described from the liens securing this note shall operate to release such property from the liens securing the Original Note.

The payment of this note is secured by a lien in a Deed of Trust of even date herewith conveying in trust to

John T. Simms, Trustee, the real property described in Exhibit "A" attached hereto and incorporated herein for all purposes.

Notwithstanding anything to the contrary contained herein, and/or the Deed of Trust securing this note, and/or any other related documents which would impose liability, Maker shall not in any event have any liability for the payment of this note, or for any other sum owing under the terms of the Deed of Trust securing this note in the event of default; rather, Payee shall look solely to the above described real property and other additional security available to Payee, for satisfaction of this indebtedness, and no suit for deficiency shall be filed against Maker on this note. The limitation imposed by the terms of this paragraph shall not impair the liens securing this note.

Any provision of this note, the Deed of Trust above described, or any other document securing the payment hereof to the contrary notwithstanding, the interest rate hereof shall never exceed the maximum rate allowed by the usury laws of the State of Texas. Maker shall not pay or be obligated to pay, and the holder of this note shall not collect and does not intend that the Maker pay, interest in an amount in excess of the maximum interest rate allowed by the usury laws of the State of Texas. If at any time it is determined that the interest called for by this note is in excess of the maximum rate of interest lawfully payable under this note pursuant to the laws of the State of Texas applicable at the time, then, at the option of the holder of this note, Maker shall either (1) pay interest at such maximum rate of interest, or (2) make the payment

as originally contemplated, but apply on the unpaid principal balance the amount so determined to be in excess of such maximum rate of interest, with any excess to be returned to Maker.

All past due principal and interest of this note, whether due as a result of acceleration of maturity or otherwise, shall bear interest from maturity until paid at the rate of ten percent (10%) per annum.

The Maker waives presentment for payment, demand, protest, notice thereof and dishonor, and diligence in collecting or notice of the intent to exercise such option or notice of the exercise of the option to accelerate the maturity of this note, and consents that the time of payment may be extended from time to time without notice.

LAKE FOREST DEVELOPMENTS,
A JOINT VENTURE

BY: /s/ John W. McMackin
JOHN W. MCMACKIN,
Managing Venturer

APPENDIX O

MEMORANDUM

TO: Leroy Land

FROM: Charles R. Ackerman

SUBJ: Lake Forest Village – Loan Feasibility

DATE: November 14, 1980

I. Scope

This memo is to review and analyze the request for two loans in the Lake Forest Village Development; as you know, this is a 73 ± acre tract lying entirely with-in the confines of Trophy Club, which property was sold to Mr. John McMackin at the time of the dissolution of the Trophy Club PPA with Mssrs. Hogan – McMackin and Johnson – Loggins.

Proceeds from the two loans will be used to retire an existing raw land loan, to complete the development of Sections III, IV, and V, and provide funds for sales cost, and interest for these sections.

II. Proposes Loans

A. Collateral Loan

$ 546,000	Proposed Loan Amount (77.5% of appraisal, 100% of note balance)
$ 704,500✓	Appraisal Value (Hagood and Associates – Oct. 7, 1980)
$ 546,170	Current note balances (77.5% of appraisal)
Collateral	28 completed lots in Sections I and II sold & under contract.
Use of Funds	See summary below.

B. Development Loan

$2,782,400	Proposed Loan Amount (80% of appraised value)
$3,478,000✓	Appraisal Value (Hagood & Assoc. – Oct. 22, 1980)
Collateral	150 existing or to be developed single family lots plus 5.3 acres of raw land for future high density use.
Use of Funds	See summary below.

C. Summary

1) Debt & Source of Funds

$2,091,190	Existing total debt, Loan 6331
- 546,000	Funds generated from collateral loan
-2,782,400	Funds generated from new development loans.
($1,237,210)	New Funds

2) Use of Funds

$1,237,210	New funds available
- 72,442	Complete Sect. III Development
- 188,251	Complete Sect. IV Development
- 502,000	Complete Sect. V Development
- 220,000	Interest to GSA
- 70,000	G&A Expenses
- 80,000	Sales Expenses
$ 104,517	"Excess Funds"

III. Background Data

The Lake Forest Village development os [sic] a 70 acre tract which was sold to John McMackin at the dissolution of the original PPA.

The 73 acres acquired by McMackin are high value acreage, which has been systematically developed by Lake Forest in the same manner and under the same restrictions as the Trophy Club. The development and sales program is summarized belwo [sic].

Sect.	Acreage	# Lots	# Sold	# Unsold	Remarks
I	14.171	43	40	3	Fully developed.
II	14.844	35	34	1	Fully developed.
III	18.145	50	6	44	95% developed.
IV	8.774	29	0	29	75% developed.
*V	14.52	76	0	76	Dev. not started.
Raw Land	5.3	___	___	___	For future hi-density
	75.754		80	150	

* In order to develop Sect. V under the current land plan, it will be necessary to for Trophy Club abd [sic] Lake Forest Village to agree on the exchange and sale of 1.8 acres of land which lies around the existing Amenity Center.

IV. Summary & Recommendations

Based on the performance of the developer to date, and the high sensitive nature of this property as it affects the future development of Trophy Club, I recommend this loan be made.

It will be subject to stringent controls with respect to Architectural Control and plat approval since the property is highly visible at the main entrance to Trophy Club.

CRA/jc/2.4.1

cc: Mike Barsi
Phil Barber
Milton Cowden

Enclosures

APPENDIX P

MEMORANDUM

TO: E. Michael Lallinger

FROM: Charles R. Ackerman

SUBJ: Lake Forest Village – (John McMackin Loan)

DATE: February 9, 1981

Following a meeting with Mr. McMackin last Thursday, Feb. 5, the following points are presented as recommended cahnges [sic] in the extension of this Loan Agreement.

$3,328,400	Total Loan Amount: Consists of $546,000 Collateral loan & $2,782,400 Development Loan.
-2,125,337	To extinguish present loan.
$1,203,063	New Money

Interest Rate: 1½% above FHLB highest Category III money, floor of 12%, ceiling of 18%. Interest paid quarterly.

Term: Loan matures on October 10, 1982. Any extension will be solely at Gibraltar's option.

Liability: John McMackin is 100% liable for loan balance.

Releases: Same as prior; 100% of net sales receipts or 110% of appraisal, whichever is greater.

Further Obligation: Gibraltar shall have no further obligations to make future loans, nor does

Gibraltar have the obligation to make interim or permanent loans on lots covered by this agreement.

CRA/jc/1.2

cc: Leroy Land

APPENDIX Q

GIBRALTAR SAVINGS ASSOCIATION
SENIOR LOAN
COMMITTEE ACTION

Borrower Lake Forest Developments Net Worth $____

_____ Net Worth $____

Guarantor (s) John McMackin Net Worth $____

_____

Does GSA have a Master File on the applicants? (X) No ( ) Yes

Lates Financial Statements dated: _____

Credit and financial information: ( ) Attached ( ) In Master File/Dated _____

Purpose: ( ) Acquisition ( ) Development (X) Refinance new money $1,203,063.

( ) Loan Extension

Security: 150 lots, 5.3 acre tract, and 28 collateral Notes, Lake Forest Village.

Location: Trophy Club Addition, Denton County, Texas

Appraised by: Hagood & Associates, Inc. As of 10-7-80; 10-22-80
$704,500 – Collateral Notes

Appraised Value $3,478,000 – 150 Lots & 5.3 Ac.
Loan ratio to value 80 %

Loan Amount: ~~$3,328,400.00~~ 3,319,300.00 Rate * _____

Fees 1% Term Mat. 10-10-82

This loan is subject to the following special requirements:

(x) Detailed narrative attached Memorandum dated 11-14-80-See further obligations 2/9/81MG

*1. 1½% above FHLB Rate Highest Cat. III – Floor 12% – Ceiling 18% – Interest paid Quarterl [sic]

2. Full Guaranty of John McMackin.

3. Releases: 100% of net sales receipts or 110% of appraisal, whichever is greater.

4. Renews and extends Loan #6331.

5. Loan amount on collateral notes not to exceed loan balance or 80% of appraisal, whichever is less.

✓ 6. Subject to current financial statements on Lake Forest Development and John McMackin.

Region: Houston (X) Approved ( ) Rejected

Date: 2-10-81

Loan Officer: James D. Hurst /s/ W. Leroy Land

/s/ Philip Barber

/s/ Illegible

Executive Committee Date: _____ /s/ Illegible